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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Changes to the Board of )  
Directors of the National Exchange )  
Carrier Association, Inc. )

CC Docket 97-21

Federal-State Joint Board on )  
Universal Service )

CC Docket 96-45

To: The Commission

**COMMENTS OF BELL SOUTH**

BellSouth Corporation ("BellSouth") hereby submits these comments in response to the Commission's *Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking* in CC Docket No. 97-21, FCC 97-292 (Aug. 15, 1997), 62 Fed. Reg. 47404 (Sept. 9, 1997) ("*FNPRM*"), regarding the amendment of Sections 64.604(c)(4)(iii)(I) (confidentiality of information supplied to the Telecommunications Relay Services ("TRS") administrator) and 54.711(universal service reporting requirements).<sup>1</sup> Although BellSouth has no objection to the Commission's proposal to amend its rules to enable the Universal Service Administrative Company ("USAC") to access TRS Fund data to verify revenue information submitted in compliance with universal service revenue requirements, it urges the Commission to amend its rules to *prohibit* the release of company-specific CMRS subscriber and revenue data supplied on TRS and universal service worksheets. Such information is confidential and proprietary in nature and there is no apparent justification for its release.

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<sup>1</sup> 47 C.F.R. §§ 64.604(c)(4)(iii)(I), 54.711(b).

**I. THE RELEASE OF COMPANY-SPECIFIC CMRS SUBSCRIBER AND REVENUE DATA SHOULD BE ABSOLUTELY PROHIBITED**

The Commission proposes to amend its rules to permit the use of TRS fund revenue data by USAC. Although the Commission generally proposes to treat such information as confidential, Sections 64.604(c)(4)(iii)(I) and 54.711(b) indicate that such information may be released in company-specific form.<sup>2</sup> As the Commission has previously noted, however, Exemption 4 of the Freedom of Information Act ("FOIA") provides that the government need not disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>3</sup> Whether commercial or financial information can be deemed "confidential" under Exemption 4 of FOIA has been the subject of much litigation. In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, the court limited the definition of "confidential" to situations where a party must submit information to a federal agency that is of a kind that customarily would not be released to the public by the person submitting the information.<sup>4</sup> The subscriber and financial information

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<sup>2</sup> 47 C.F.R. §§ 64.604(c)(4)(iii)(I), 54.711(b). Specifically, Section 64.604(c)(4)(iii)(I) states that "The [TRS] administrator shall keep all data obtained from contributors and TRS providers confidential and shall not disclose such data in company-specific form *unless directed to do so by the Commission*." The Commission proposes to amend Section 54.711(b) to impose this same condition on USAC. *FNPRM* at ¶ 24.

<sup>3</sup> 5 U.S.C. § 552(b)(4); see *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, *Notice of Inquiry and Notice of Proposed Rulemaking*, 11 F.C.C.R. 12406, 12408 (1996) ("*Confidential Treatment NPRM*").

<sup>4</sup> 975 F.2d 871, 879 (D.C. Cir. 1992). The Commission has recognized that the court's position in *Critical Mass* stands for the proposition that "if commercial or financial information obtained from a person is submitted voluntarily and would not customarily be disclosed by the submitter, it is deemed confidential. . . ." *Confidential Treatment*, 11 F.C.C.R. at 12410.

that CMRS carriers are *required* to provide on the TRS and universal service worksheets satisfies this “confidential” definition — it customarily would not be released to the public.<sup>5</sup>

Moreover, the Trade Secrets Act stands as an affirmative restraint on any agency’s ability to release competitive information. The U.S. Court of Appeals for the District of Columbia Circuit has previously held that if information may be withheld under Exemption 4, an agency is barred from disclosing it by the Trade Secrets Act unless the disclosure is otherwise authorized by law.<sup>6</sup> Although Sections 0.457(d)(1) and (2)(i) of the Commission’s rules provide the Commission with the legal authority to disclose competitively sensitive information upon a “persuasive showing” of the reasons in favor of the information’s release, Section 0.457(d)(2)(i) provides that “if it is shown in the request that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the material will not be made routinely available for inspection.”<sup>7</sup> Because the CMRS subscriber and financial data supplied on the TRS and universal service worksheets is of the type customarily guarded from competitors and qualifies for protection from FOIA requests pursuant to Exemption 4, the Commission is prohibited from disclosing it.

The Commission has not stated why the disclosure of potentially competitively sensitive information could be necessary or what important public interest issue it could resolve. It has provided no statement of public benefits that would arise from releasing proprietary and confidential company-specific CMRS information because *there is no public interest issue or benefit achieved*

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<sup>5</sup> Unlike regulated local exchange companies, CMRS carriers are not required to make subscriber data publicly available.

<sup>6</sup> *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987).

<sup>7</sup> 47 C.F.R. § 0.457(d)(2)(i).

by such publication. If the Commission's goal is to ensure that contributions to the universal service support mechanisms are accurate, it has accomplished that goal by amending its rules to provide USAC access to TRS Fund data to verify revenue information submitted in compliance with universal service revenue requirements.

## **II. THE COMMISSION SHOULD AMEND ITS RULES TO TREAT CMRS SUBSCRIBER AND FINANCIAL DATA AS CONFIDENTIAL**

Section 54.711(b) provides that universal service "[c]ontributors may make requests for Commission nondisclosure of company-specific information under § 0.459 at the time that the subject data are submitted to the Administrator."<sup>8</sup> Similarly, Section 0.459 authorizes parties to request confidential treatment of proprietary information supplied to the Commission.<sup>9</sup> These sections are insufficient, however, to guarantee TRS and universal service contributors that the information they supply will be treated confidentially. The Commission retains the discretion to determine on a case-by-case basis that the information is not proprietary in nature.

The possibility of disclosure of this information will cause substantial harm to the competitive position of a contributing entity. Thus, under the Commission's proposal, every CMRS provider can be expected to request confidential treatment of the subscriber and financial data that it is *required* to supply on the universal service and TRS worksheets. These requests, in turn, will increase the Commission's administrative burdens unnecessarily. The worksheets request very specific subscriber data in order to determine the financial contribution a carrier must make. The proprietary nature and competitive sensitivity of this information is the same for all CMRS carriers. Rather than require every CMRS provider to request confidentiality, the Commission should declare

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<sup>8</sup> 47 C.F.R. § 54.711(b).

<sup>9</sup> 47 C.F.R. § 0.459.

that all CMRS subscriber and financial data supplied on TRS and universal service worksheets constitutes confidential data subject to FOIA, Exemption 4. The disclosure of company-specific CMRS subscriber and revenue data has *not* been shown by the Commission to be necessary for it to fulfill its regulatory duties. In fact, the Commission does not elaborate on the need to disclose such information other than to state that it may do so.<sup>10</sup>


### CONCLUSION

For the foregoing reasons, the Commission must not provide for the release of company-specific revenue data submitted in compliance with TRS and universal service mandates. Any decision to release such information would serve no public interest, and will competitively harm universal service contributors.

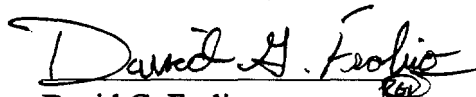
Respectfully submitted,

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September 11, 1997

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<sup>10</sup> 47 C.F.R. §§ 64.604(c)(4)(iii)(I), 54.711(b).

## CERTIFICATE OF SERVICE

I, Jennifer A. Burton, do hereby certify that copies of the foregoing "Comments of BellSouth" were served by U.S. first-class mail, postage prepaid, on this 11th day of September 1997, upon the following:

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